United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-7655

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

-against-

CHARLES BEATY, WILLIAM R. BREEN, JOHN P. CARR, FRANKLIN D. DACK, DAVID LEWIS DAVIES, FRANK DAVIS, CHESTER LEE EDWARDS, OTTO F. FLEISCHMANN, ROBERT W. GAUGHAN E.T. GREENE, LAWRENCE RAYMOND JESSE, KENNETH E. LENZ, EDWARD A. LEONHARD, A.C. LOOMIS, Jr., VERNON C. MEYER, JAMES MILTON MILLER, MARSHALL EARL QUACKENBUSH, CHARLES V. TATE and CHARLES E. WOOLSEY,

Defendants-Appellants.

AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

TRANS WORLD AIRLINES, INC., Plaintiff-Appellee, -against- CHARLES BEATY, WILLIAM R. BREEN, JOHN P. CARR. FRANKLIN D. DACK, DAVID LEWIS [illegible]S, FRANK DAVIS, CHESTER LEE EDWARDS, OTTO F. FLEISCHMANN, ROBERT W. GAUGHAN, E.T. GREENE, LAWRENCE RAYMOND JESSE, KENNETH E. LENZ, EDWARD A. LEONHARD, A.C. LOOMIS, Jr., VERNON C. MEYER, JAMES MILTON MILLER, MARSHALL EARL QUACKENBUSH, CHARLES V. TATE and CHARLES E. WOOLSEY, Defendants-Appellants.	No. 75-7655

AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

TWA's complaint requests the Court to stay the arbitrations demanded by the defendants on July 22, 1971, under Individual agreements between TWA and defendants. TWA contends that (1) no valid subsisting contracts to arbitrate have been made, the agreements to arbitrate having terminated, (2) the defendants failed to assert their claims in a timely manner, and (3) no arbitrator other than the TWA-ALPA System Board

has jurisdiction to resolve the claims raised by the defendants in their notices to arbitrate.

On or about September 17, 1971, defendants moved to dismiss the complaint for failure to state a cause of action. The motion was denied by U.S. District Judge Irving Ben Cooper on February 15, 1972. On January 31, 1972, defendants moved to stay the proceedings of the TWA Pilot System Board of Adjustment. The motion was denied on March 3, 1972. The TWA Pilot System Board conducted hearings between March 2, 1972 and June 1, 1972 and issued its decision on March 2, 1973, denying grievants' claims under the TWA-ALPA basic working agreement. A trial was held before U.S. District Judge John M Canella on December 2, 1974. Judgment for the plaintiff was filed on November 6, 1975.

ISSUES PRESENTED

Whether the right of defendant-appellants to arbitrate the claims which they have made under Individual agreements between them and plaintiff-appellee to the effect that they have been denied their prior rights to occupy the flight engineer position in violation of such agreements was terminated by their discharges for failure to complete student captain (pilot) training satisfactorily.

Whether the right of defendant-appellants to arbitrate their claims under the Individual agreement has lapsed because they have failed to assert their claims in a timely manner.

Whether the arbitrator designated by the parties in the Individual agreements to hear and determine violations thereof has jurisdiction to resolve the claims raised by the defendants-appellees in their notices to arbitrate.

STATEMENT OF FACTS

Crew Complement Agreement Guaranteed Defendants' Prior Right to Flight Engineer Position.

The 1956-1962 Crew Complement controversy involving Trans World Airlines ("TWA"), the Air Line Pilots Association ("ALPA") and the Flight Engineers International Association ("FEIA") was settled by agreement between TWA and FEIA in June, 1962 (Jt. Ex. 2, App. p.A-41) and by agreement between TWA and ALPA in September, 1962 (Jt. Ex. 8, App. p.A-53). The flight engineers then employed by TWA (designated in the agreements as "Memorandum A and A1 Flight Engineers" to distinguish them from

the future or new hire flight engineers) sought to avoid being displaced by pilots who would be trained and licensed in the flight engineer position, as demanded by ALPA. (Jt. Ex. 5, App. p. A-46). They insisted upon, and obtained, TWA's assurance of their job security, particularly as against any subsequent displacement because of a change in representation. The change in representation which they feared, to the knowledge of TWA, was a transfer of representation from FEIA to ALPA, as the number of new hire pilots who filled flight engineer positions would exceed the number of professional flight engineers on the seniority list. (Tr. p. 49; App. p. A-114). In return for that assurance by TWA, FEIA agreed with TWA to abandon the then existing contractual requirement of an A and P(Mechanic) license so that new hires in the flight engineer position could be qualified pilots who would be trained for the flight engineer position, without an A and P license, and to accept specific minimal pilot qualifications for the A and Al flight engineers.

Defendants Received Individual Agreements From TWA

TWA's assurance was given the A and Al flight engineers in a Crew Complement Agreement with FEIA, dated June 21, 1952, guaranteeing the priority of every A and Al flight engineer to the flight engineer position on TWA aircraft as against any

other flight crew member (meaning pilots) "at all future times." (Jt. Ex. 2, p. 93; App. p. A-41). In order that the guarantee could be implemented effectively by each flight engineer when necessary, no matter what organization might at the time be the accredited representative of TWA's flight engineers (and most particularly if that organization should be ALPA, the majority of whose members might not be inclined to continue the flight engineers' priority rights in succeeding agreements or might yield too readily to TWA in failing to implement them), Memorandum C of the Crew Complement Agreement required that it be made with each individual A and A1 flight engineer and enforcible by him individually through an appeal to a neutral arbitrator, independent of any bipartisan System Board of Adjustment (Jt. Ex. 2, p. 105; App. p. A-43).

After the Crew Complement Agreement, including Memorandum C, was executed and ratified by the A and A1 flight engineers, the attorneys for FEIA and TWA were directed to prepare the form of the Individual agreement that the parties had agreed in Memorandum C to submit to each A and A1 flight engineer (Tr. p. 4; App. p. A-170)(Jt. Ex. 2, p. 105; App. p. A-43). They prepared and submitted the Individual agreement as set forth in Joint Exhibit 7 to Mr. David Crombie,Vice-President-Personnel,TWA, and Mr. Harrison S.

Dietrich, President, FEIA, for their approval and execution. Each individual flight engineer, Mr. Crombie and Mr. Dietrich then signed each Individual agreement (Jt. Ex. 7, App. p. A-51,52).

The arbitration clause in the Individual agreement in relevant part reads as follows:

> 5. "In the event that the Company threatens to sign any agreement or to take any action which denies or will, immediately, or in the future, directly result in the denial of Flight Engineer's prior right to bid for and occupy the flight engineer's position, as provided herein and in the aforesaid Agreement of June 21, 1962, or which modifies, varies from or is inconsistent therewith, or if the Company has signed such an agreement or has taken such action, Flight Engineer shall have the right to assert his objection to the Company by notice in writing by registered mail or by telegram. The Company shall reply to said objection within four (4) calendar days by registered mail or telegram. If Flight Engineer deems said reply to be unsatisfactory, he may, within four (4) calendar days, submit his said objection to Nathan Feinsinger or if he is unable to serve, to James C. Hill, as arbitrator. * * *"

Defendants Occupied Pilot Positions Without Loss of Flight Engineer Seniority

In 1963, certain flight engineers sought to implement their newly acquired pilot qualifications and seniority status by applying for first officer positions. After several bulletins published by TWA to the A and A1 flight engineers and after a screening process administered solely by management

representatives, TWA accepted a number of applications from A and A1 flight engineers, including the grievants, who voluntarily bid for and were assigned positions as TWA Pilot First Officers and continued to serve as such until their discharge (Pre-Trial Order, Par. 13; App. p.A-19). Their positions on the flight engineer and pilot seniority lists were unchanged.

ALPA Replaced FEIA As Bargaining Representative In 1968

With the addition of many new hire pilots to TWA's complement of flight engineers between 1962 and 1968, the change in representation from FEIA to ALPA occurred in March, 1968, just as was feared by the A and A1 flight engineers in June, 1962. (Pre-Trial Order, Par. 14; App. p.A-19.)

Defendants Were Discharged For Failure to Complete Student Captain (Pilot) Training Satisfactorily and Requested Arbitration Under Individual Agreements Claiming Denial of Prior Rights.

Between August, 1968 and March, 1970, defendants, after serving loyally and efficiently as first officers, were assigned to training for upgrading to TWA Captain. Each defendant was alleged by TWA to have failed to complete that training satisfactorily, and in accordance with TWA's customary practice at

the time of discharging pilots who fail student captain training, his employment with TWA was terminated. (Pre-Trial Order, Par. 20, App. p. A-21.)

Each of the defendants, other than Carr, Davis and Quackenbush, filed a grievance under the TWA-ALPA Agreement and processed it to the TWA-ALPA Pilot System Board of Adjustment. (Pre-Trial Order, Par. 22, App. p. A-23.) In June, 1971, prior to a hearing by the Board on their claims under the TWA-ALPA basic agreement, all the defendants asserted their rights to the flight engineer position under their Individual agreements and requested arbitration under those agreements. (Jt. Ex. 13, App. p. A-57.)

TWA denied defendants' request for arbitration in a letter dated July 2, 1971 (Jt. Ex. 14, App. p. A-58.) Defendants thereupon served upon TWA formal notices of intent to arbitrate in accordance with Section 7503(c) of the New York Civil Practice Law and Rules (Jt. Ex. 15, App. p. A-61.)

TWA Requests Stay of Arbitration Under Individual Agreement

On August 9, 1971, TWA served the complaint in this proceeding to stay the arbitration requested by the defendants. While this proceeding was pending and over the protest of the

defendants (rejected by the District Court on March 3, 1972), on March 2, 1972, the TWA-ALPA System Board of Adjustment, consisting of two ALPA representatives and two TWA representatives and a neutral, Arthur Stark, proceeded to hear the complaints which nine (9) of the defendants* had submitted to the TWA-ALPA System Board of Adjustment under the TWA-ALPA Working Agreement. TWA and ALPA asserted to the Board that the grievants were discharged for just cause and had no right to return to the flight engineer position. (Pre-Trial Order, Par. 30, App. p. A-27.)

TWA-ALPA System Board
Sustained the Discharges

The System Board sat with a neutral fifth member, who reached the following conclusion:

> "The majority of the regular Board members agree with the first view expressed above. The decision, therefore, must be to deny all of the claims."[1]

---

* Beaty, Breen, Dack, Jesse, Lenz, Leonhard, Loomis, Tate and Wenzlaff.

1 "The Collective Bargaining Agreement requires that "a decision of the majority of the Board sitting with the fifth member shall be final and binding upon the parties . . ., (Section 21-A(M). In the present case, no matter how the Referee might vote, the outcome would be the same."

> "I do not believe, however, that my role should include an expression of approval or disapproval of a decision which the regular members have reached, a decision which in essence reflects the contracting parties' agreement on the meaning and application of their own contract. It should be noted, nevertheless, that while reasonable men may disagree on what the decision in this case should be, it cannot be said that the conclusion reached is irrational or capricious. Whether one agrees with it or not, the decision here is a tenable one." (Emphasis supplied.)
>
> Arthur Stark - Referee
> March 2, 1973 (Jt. Ex. 17, p. 49, App. p.A-65.)

The 19 defendants, not having submitted their priority claims to the TWA-ALPA Pilot System Board of Adjustment under the Individual agreement, continue to press their claims before the Individual arbitrator that their discharges as flight engineers deny them their priority to the flight engineer position on TWA aircraft in violation of Memorandum C and of the Individual agreements; that the only forum for the determination of that issue is the Individual arbitrator.

POINT I.

DEFENDANTS' DISCHARGE DOES NOT TERMINATE THEIR RIGHT TO ARBITRATE A CLAIM THAT THEY HAVE BEEN DEPRIVED OF A PRIOR RIGHT BY THEIR DISCHARGE, WHATEVER BEARING THEIR DISCHARGE MAY HAVE ON THE SURVIVAL OF THEIR CLAIMS UNDER MEMORANDUM C AND THE INDIVIDUAL AGREEMENT BEFORE THE INDIVIDUAL ARBITRATOR

TWA has denied the flight engineer position to 19 of the

"A" flight engineers by discharging them. They have been replaced by 19 new hire pilots. ALPA supported the discharges and endorsed the right of the new hire pilots to displace the 19 "A" flight engineers. Subsequent to the demands of the defendants that their claims to the flight engineer positions be arbitrated under the Individual agreements, the TWA-ALPA System Board of Adjustment sustained TWA and ALPA (Jt. Ex. 17, App. p.A-64). The 19 protest that their discharges under the circumstances deny them their priority to the flight engineer position as against the other flight crew members (pilots) in violation of the Agreement of June 21, 1962 and request that their protests be heard and resolved by the Individual arbitrator, under the Individual agreements, as promised.

Whether the claim of each of these 19 flight engineers is a sound one under Memorandum C and the Individual agreements, which ALPA and TWA assert it is not, and whether the finding by the TWA-ALPA System Board of just cause as meant by the TWA-ALPA Basic Agreement preclude them from contending that TWA must nevertheless recognize their prior rights under Memorandum C and the Individual agreement, go to the merits of their claim

and is not an issue which is argued herein before this Court.[2] The defendants do not concede that there was just cause for their discharge as A flight engineers within the meaning of Memorandum C and the Individual agreement, but reserve their argument to that effect for the arbitrator, because just cause for their discharge, or the significance of the System Board's finding to that effect, does not resolve the sole issue herein, viz., whether "a valid agreement to arbitrate" was made within the meaning of Section 7503(b) of the New York Civil Practice Act. (Complaint, Par. 15; App. p. A-11).

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2 "In determining whether to direct arbitration, however, this Court ought not to consider, and has not considered, the merits of the controversy." Pock v. N.Y. Typographical Union No. 6 (1963), 223 F. Supp. 181, 184; United Steel Workers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S.574, 582; United Steel Workers v. American Manufacturing Co., 363 U.S. 564, 569.

The defendants recognize, however, as Judge Cannella ruled, that the Court determines whether the employer is bound to arbitrate the claims before the Individual arbitrator on the basis of the Agreements entered into by the parties on June 21, 1962 and the Individual agreements.

TWA persuaded the Court below that these 19 individuals have no right to submit their claims to the Individual arbitrator because their discharges, even as flight engineers, have been upheld as for just cause by the TWA-ALPA Pilot System Board of Adjustment. The TWA contention is that the Individual agreement remains in effect only until the resignation, voluntary retirement or discharge for cause of the individual A or A1 flight engineer. Therefore, as soon as TWA discharges him, even if the Individual arbitrator might find that the discharge violates Memorandum C and the Individual agreement and unlawfully denies him the promised priority to be in the flight engineer position which the arbitration procedure is designed to protect, the Individual agreement is nevertheless terminated by the discharge and for the same reason that he has been illegally denied his priority, the engineer no longer has the right to have his denial of priority remedied

before the Individual arbitrator.[3]

No question has ever been raised or suggested that the defendants are not fully qualified as flight engineers. On the contrary, by reason of their long years of service with TWA and in some cases, their service as check and training flight engineers, and because of their qualifications and experience as first officers, the defendants have been accepted throughout this extended proceeding as well qualified to fill the flight engineer position, subject only to the normal retraining and check procedures that are applicable upon a long absence from

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3 "There must have been a reason," Yossarian persisted, pounding his fist into his hand. "They couldn't just barge in here and chase everyone out. ***

"*** All they kept saying was 'Catch-22.' What does it mean, Catch-22? What is Catch-22?

"Didn't they show it to you?" Yossarian demanded stamping about in anger and distress. "Didn't you even make them read it?"

"They don't have to show us Catch-22," the old woman answered. "The law says they don't have to."

"What law says they don't have to?"

"Catch-22."

Catch-22 by Joseph Heller
Dell Publishing Co., p. 416

duty, on the particular aircraft to which the airman is assigned. Also, because of their long years of service with TWA, they had reached an age at the time of their discharge that precluded them from finding employment as flight engineers on any other trunk carrier.

TWA Confuses the Duration of its Obligation to Recognize the Defendants' Prior Rights With the Duration of the Agreement and of Defendants' Right to Arbitrate Under the Individual Agreement.

The defendants assert, and plaintiff agrees, that the Individual Agreement was designed and intended to assure to each A and A1 flight engineer, if and when he claimed that his prior right to the flight engineer position was violated by any action of TWA, or by an agreement between TWA and ALPA, that his claim would not be resolved by TWA or by ALPA, or by a TWA-ALPA System Board, but would be decided in a truly neutral environment (Pre-Trial Order, Par. 8, App. p.A-17).

> "Q. Do you recall the reason for that memorandum in the crew complement agreement, and if so, what was it?
>
> "A. I recall, Asher, a couple of reasons put forward by the union people including yourself.
>
> Among those reasons were: The prospect that flight engineers, these men, at some later date, might have a different representative who would not be as avid in the preservation of their objectives as their present representative. ***
>
> And for these reasons, I think those were the two principal reasons that these men felt that they needed them. We went along, (sic) these individual agreements to give them that assurance.

"Q. What was the representative that the flight engineers feared might become their new representative?

"A. Well, of course, it was obvious at that time that the great overriding fear was ALPA, the Airline Pilots would somehow or other end up as their representative.

"Q.*** And the fear was that the flight engineers might be displaced by the pilots and that was the reason for giving the flight engineers their priority, isn't that right?

"A. I think so.

"Q. *** Do you recall the reason for this separate agreement as to the resolution of disputes under the crew complement agreement?

"A. *** The flight engineers had a unique confidence in Nathan Feinsinger who had been with the dispute or with the resolution of the dispute from the beginning. They felt he had an understanding of the whole problem, particularly of the crew complement issues, and as I understand this letter, it is our agreement with them that, if disputes arose between an individual flight engineer and the company relating to the crew complement issues, they would be referred to Dr. Feinsinger rather than to the System Board."

David Crombie, Vice President, TWA
(Tr. p. 4, pp. 48-50, App. p.A-113)

The means adopted in the Individual agreements, as drafted by TWA and FEIA lawyers, to accomplish this objective was final and binding arbitration by a neutral arbitrator acting under the laws of the State of New York. The intent and objective of the Individual agreement was to establish a neutral machinery

for enforcing the prior right that was already agreed upon and guaranteed in Memorandum C and in the terms of Memorandum C.

TWA here seeks to frustrate that objective of both parties in the very area for which Memorandum C was expressly designed, viz., when the A or A1 flight engineer would be dismissed and replaced by a pilot, and FEIA would be displaced by ALPA as his representative. This perversion of the intent and design of Memorandum C of the Crew Complement Agreement is horrendous to the entire complement of A and A1 flight engineers who believe, with good reason, that this situation was exactly what was being avoided by their execution of the Individual agreements.

It must be borne in mind that the result in this case will not be confined to those A and A1 Flight Engineers who became pilots, simply because that happens to be the case in this proceeding. The flight engineer who remained in the flight engineer position and is discharged for failure to meet any pilot or other non-flight engineer qualifications will be in exactly the same posture as that of each defendant in losing the neutral environment he bargained for in the determination of his claim to prior rights under Memorandum C. TWA's concept would have this Court make it impossible for the neutral ever to treat the claim, so long as TWA and ALPA find just cause for the flight engineer's

discharge. Which gets us back to our initial proposition, that TWA's application for a stay of arbitration in this proceeding contravenes the principal design and intent of Memorandum C and of the Individual agreement as to every A and A1 flight engineer.

The manner in which TWA accomplishes this distortion is to convert a clause in the Individual agreement which intends only to reaffirm the flight engineer's prior right, to re-define the persons to whom that right has been granted, and to reassure its survival despite any intervening agreements, into a duration clause of the entire agreement, which it is not. A plain reading of the Crew Complement Agreement, the entire Individual agreement and particularly of Memorandum C which sired it, rather than a distorted reading of one clause in the Individual agreement without reference to the entire understanding of the parties as embodied in these several agreements, all designed with the same intent and purpose, made between the same parties, and reached simultaneously, shows the error in TWA's proposed construction of the Individual agreement.

The Crew Complement Agreement of June 21, 1962 and Memorandum C

The clause cited by TWA is not and was not intended to be a duration of agreement clause. The intention of the parties

as to duration is made clear in the body of the Crew Complement Agreement of June 21, 1962, in Memorandum C, and in the Individual agreements. The body of the Crew Complement Agreement states:

> "(f) The Flight Engineers listed in Memoranda A and A-1 shall be recognized as entitled at all future times and until retirement or discharge for cause to priority rights to all Flight Engineer positions required by the Company's operations, as detailed and implemented in attached Memorandum C."
>
> (Jt. Ex. 2, Par. 1(f), p. 93, App. p.A-41)

Thus, the entitlement to priority rights, not the agreement nor the right to claim them, is ended by retirement or discharge for cause.

Memorandum C of the Crew Complement Agreement spells out the prior right in greater detail. The first paragraph of Memorandum C (1) defines the prior right, (2) describes the person to whom it applies, (3) declares who must recognize that right, and (4) states for how long the Company and its successors and assigns are obligated to recognize that right, viz., "until retirement, voluntary resignation, or discharge for cause."

> "So long as the Company, its successors or assigns, includes or is required by law or federal regulation to include as a member of its cockpit flight crews in excess of two airmen and one airman is assigned to perform the flight engineering functions, the Company, its successors and assigns, agrees that it will offer to all flight engineers named on Memoranda A and A1 the prior rights as against flight crew members other than

> flight engineers to bid and occupy all flight engineers positions required by the Company's operations and those of its successors and assigns until their retirement, voluntary resignation or discharge for cause. There shall be included among the said engineers so entitled to priority those engineers furloughed after the execution of this agreement because of no available flight engineer vacancy to which their seniority entitles them to bid and who are subsequently recalled."
>
> (Jt. Ex. 2, p. 105, App. p.A-43)

The second paragraph of Memorandum C requires that "This agreement" be made with each individual directly and enforceable by him. (Emphasis supplied)

> "This agreement of the Company is to be made with each individual directly and is to be legally enforceable by him against the Company, and its successors and assigns, ***

It then defines the duration of the Individual agreement as follows:

> "*** and it shall be in such form as shall survive the duration of the basic working agreement and succeeding agreements and is intended to continue in effect unless at any time a majority of such flight engineers shall voluntarily decide to reopen this agreement /Memorandum C/ for modification or repeal."
>
> (Jt. Ex. 2, p. 105, App. p.A-43)

The Court will note that there is no mention of the phrase, "retirement, voluntary resignation or discharge for cause," in this second paragraph, which defines the duration of the agreement, as contrasted with its use in the first paragraph, in which is stated the duration of the obligation of the Company.

The distinction between the duration of the obligation, viz. "until flight engineer's retirement, voluntary resignation or discharge for cause," i.e. when he is no longer an employee, and the duration of the agreement, viz. "in such form as shall survive the duration of the basic agreement and succeeding agreements and is intended to continue in effect unless at any time a majority of such flight engineers shall voluntarily decide to reopen this agreement for modification or repeal," is vital to the issues in this proceeding. Before the arbitrator, the issue will be whether the Company any longer had any obligation under the Crew Complement Agreement to the defendants as employees. He may decide that they are no longer employees because of their discharge or resignation and are therefore no longer within the orbit of Memorandum C and the Individual agreement. We do not argue that issue before this Court.[4]

A fair reading of Memorandum C and of the Individual agreement shows that the Individual agreement must have the same meaning in all respects as does Memorandum C, which required that it be made with each individual directly in addition to having been made by the Company with FEIA. The FEIA's and the Company's lawyers were commissioned only to draft the document by which

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4 Pock v. N.Y. Typographical Union No. 6, Supra, p. 12

"This agreement" was to be made directly with each individual. (Tr. 4, App. p. A-69.) It follows from the terms of both agreements that if Memorandum C has not expired, the Individual agreement may not expire so as to terminate the remedy incorporated therein for any violation of that agreement by TWA.

It is unfortunate that counsel so displaced the phrase "until retirement, voluntary resignation or discharge for cause" from Memorandum C as to make it appear to be a phrase defining the duration of the Agreement rather than what it was in Memorandum C, viz., a limitation on the obligation of the Company and its successors and assigns to recognize the prior right of the flight engineer. The displacement is father to an ambiguity which must be resolved in accordance with the intent of the parties. This was to incorporate Memorandum C into the Individual agreement, adding only the grievance machinery which would permit the flight engineer to reach out to Dr. Feinsinger if he claimed that the prior right granted to him by the Crew Complement Agreement and Memorandum C was violated.

The Individual Agreement

Nor do the Individual agreement's terms, despite its displacement of the phrase "until retirement, voluntary resignation or discharge," claim a reading that so drastically differs

from the intent of the parties and the terms of Memorandum C in this connection.

The first two paragraphs in the body of the Individual agreement are taken from the text of Memorandum C except that the "until retirement, voluntary resignation or discharge for cause" phrase is transferred from the paragraph defining the Company's obligation (paragraph 1) to the paragraph that provides for the survival of the agreement beyond any future collective bargaining agreement between TWA and any other representative of the flight engineers (paragraph 2). That this was not an intended variance from Memorandum C is clear from the second "Whereas" clause in the Individual agreement which refers to the phrase "until retirement, voluntary resignation or discharge for cause" exactly as it is used in Memorandum C, viz., in its first paragraph, which defines the obligation of the Company, not the duration of the agreement.

> "WHEREAS, that Agreement, /Memorandum C/ in part, requires that the Company make an individual agreement with each of the flight engineers referred to in Memoranda A and A1, including Flight Engineer, agreeing to offer him the prior right as against flight crew members other than flight engineers to bid for and occupy any flight engineer position required by the Company's operations and those of its successors and assigns, until his retirement, voluntary resignation or discharge for cause, said individual agreement to be in such form as shall survive the duration of the basic working agreement and succeeding agreements between the Company and the Association, its successors and assigns; . . . "
>
> (Jt. Ex. 7; App. p.A-49)

Furthermore, the Individual agreement prohibits the Company from entering "into any agreement which modifies, varies from, or is inconsistent with any of the terms and provisions of this Agreement or of the aforesaid Agreement of June 21, 1962." (Emphasis supplied) (Jt. Ex. 7, Par. 4, App. p.A-50)

Finally, and most significantly, Section XXIII of the first basic agreement between TWA and FEIA that was agreed upon after June 21, 1962 and that was signed by the same persons who negotiated all the crew complement agreements (Jt. Ex. 2, App. p.A-40), states:

> "(B) The parties to this Basic Agreement understand and agree that in the event of any conflict or difference which may now exist or arise in the application or interpretation of the terms of this Basic Agreement signed November 21, 1962, or any other agreements between the parties hereto, and the Memorandum of Agreement as defined in (A) above /"Memorandum of Agreement dated June 21, 1962 ***, including Memoranda A, B, C and D of such agreement"/ such Memorandum of Agreement shall in all ways control." (Emphasis supplied)
>
> (Jt. Ex. 2, p. 76, App. p.A-40)

* * * * * * * * * *

The emptiness of TWA's pedantic rationale is revealed by a footnote in TWA's brief to the District Court.

> "If arbitration had been requested before the defendants were discharged, the Individual Agreements may indeed have permitted arbitration of TWA's announced intention to discharge upon failure to satisfactorily complete Captain's training, as a

> threatened violation of 'prior rights', an arbitrable claim under the Individual Agreements. But not one of these defendants requested arbitration prior to discharge although all of them have stipulated that they knew of TWA's position years before they were discharged, and even more years before they requested arbitration. (PTO, p. 7, Par. 18)"
>
> (TWA Reply Brief, March 26, 1975, p. 11.)

This argument really reduces TWA's contention to a claim of laches, which is covered elsewhere in this brief. It also so distorts the true intention of the parties and is so grossly unfair to the defendants as to border upon malice.

Even though they knew or had reason to know that TWA intended to discharge them for failing to complete student Captain training satisfactorily, defendants also knew that practically every such discharge of pilots, if not all, is followed by an appeal to the TWA-ALPA System Board, as provided in the TWA-ALPA Pilot Agreement which states that "When a pilot fails to qualify as captain in his proper turn ***, his case shall be handled as the circumstances indicate, subject to Section 21 /the Grievance Procedure/" (Jt. Ex. 10, Par. 6(B)(16)). Their prospect or hope, like that of every pilot who failed, was at least to persuade the Board that they should get another try at student Captain training. (Pre-Trial Order, Par. 27, App. p.A-25). Indeed, several of the defendants did get another

chance, but later failed. (Pre-Trial Order, Par. 29; App. p.A-26). But this was another chance to make captain. It was illogical and inconsistent for them to try for another chance at making captain, as did every other pilot similarly situated, and also to grieve the Company's threatened refusal to reinstate them as flight engineers under the Individual agreement. Indeed, TWA could have been counted upon then to contend that the Individual arbitrator had no jurisdiction because the defendant who did not appeal to the TWA-ALPA System Board had failed to exhaust his remedy under the agreement that covered claims of discharge without just cause under the TWA-ALPA Pilot Agreement.

The truth is that they followed a procedure that seemed logical to them and they had no reason to believe otherwise. There was no precedent on which to rely in this unique situation. The Individual agreement had never before been tested. They submitted their claims when they had claims, viz., when the Company "has taken such action." (Jt. Ex. 7, Par. 5; App. p.A-50).The quoted clause is worded in the disjunctive. "In the event that the Company threatens to sign any agreement or to take any action ***, or if the Company has signed such an agreement or has taken such action ***. (Id. Par. 5; App. p.A-50).This clause

too, indicates that it was the express intention of the parties in the Individual agreement that the flight engineer retain the right to arbitrate after discharge when the discharge is the "any" action which "the Company has taken." .To fit this sequence, the discharge must have taken place before the flight engineer requests arbitration.

As was stated above, TWA's contention on non-arbitrability upon discharge under the Individual agreement is equally applicable to flight engineers who did not become pilots and as to whom there will be no advance notice of intent to discharge.

POINT II.

EVEN IF INDIVIDUAL AGREEMENT TERMINATED UPON DISCHARGE, FLIGHT ENGINEER RETAINS RIGHT TO ARBITRATE.

It takes no citation of authority to establish that the right to demand arbitration of a claim that a discharge was without just cause always survives the discharge. It was therefore reasonable for the defendants to assume that their right to demand arbitration of a claim that the discharge denied them their prior rights, also survives the discharge, certainly before it was upheld as for just cause by the TWA-ALPA System Board.

Even if we accept TWA's construction of the Individual agreement that upon discharge the Agreement would have been terminated, the right to commence arbitration under its arbitration procedures remained available.

> "*** the agreement to arbitrate is prospective and the duty to arbitrate survives the termination of the agreement. Grievances which are based upon conditions arising during the term of the agreement to arbitrate are arbitrable after that term has expired."
> Procter & Gamble Ind. U. v. Procter & Gamble Mfg. Co. (1962, 2d Cit.) 312 F. 2d 181, 186.

In United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), the Supreme Court reversed a ruling that rights created and arising under collective bargaining agreements remain in force only for the life of the contract and held that an arbitrator's order reinstating workers and awarding back pay was enforceable even though the award was made after the expiration of the contract. Similarly, in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957), the Court enforced a contractual obligation to arbitrate past grievances even though there was no longer any real collective bargaining relationship between the union and the employer.

The question really is, on this issue, whether the claim, viz., that the discharge denied the defendants their prior rights,

arose when the Individual agreement was still in effect. When TWA discharged the defendants, the agreement was in effect. If it was not, then the phrase "until retirement, voluntary resignation or discharge for cause" would also not have been in effect. That phrase draws its meaning and significance from the agreement itself at the moment of the discharge. If that phrase was in effect at that moment, so was the priority clause, which was in the same agreement. This possibly presents a "puzzlement" which could hardly have been intended to govern the assurances given to the A and A1 flight engineers, even by the clumsy lawyers who drafted the Individual agreement.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
>
> United States Steel Workers v. Warrier & Gulf Nav. Co., 363 U.S. 574, 582, 583 (1960).

POINT III.

ALPA'S DUTY OF FAIR REPRESENTATION DOES NOT SATISFY TWA'S OBLIGATION TO THE A AND A-1 FLIGHT ENGINEERS UNDER THE INDIVIDUAL AGREEMENTS.

It has been suggested that the defendants' remedy is an appeal to the courts upon the ground that ALPA, as their accredited

representative, has not lived up to its obligations under the Railway Labor Act. (Tr. p. 43; App. p. A-108)

The Individual agreement was meant to avoid that formidable and costly hurdle by affording the A and A1 flight engineers a single person as the adjudicator, naming him, broadening the scope of his authority to a review of "any agreement" or "any action" by the Company, whether taken or threatened, without the necessity for a formal submission, without the elaborate machinery of a board of adjustment and with full authority in the arbitrator to "direct such action by the Company as is necessary to assure full and continuous protection of Flight Engineer's prior right, ..." (Jt. Ex. 7, Par. 6; App. p.A-51).

The right of an employee covered by the Railway Labor Act and the duty of his accredited representative to afford him fair representation was well known to the airline industry, TWA, FEIA, ALPA and the flight engineers in 1962. Had TWA and FEIA and the A and A1 flight engineers been content to rest their priority guarantees on ALPA's, FEIA's, or any other organization's duty of fair representation, the execution of an Individual agreement, in addition to Memorandum C, would have been unnecessary. That they were not content with the law's protection in this respect is obvious and the reasons therefor were sound.

As the courts have defined the Organization's duty of fair representation under the Railway Labor Act, it is "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them." Steele v. Louisville & Nashville R.R. Co. (1944) 323 U.S. 192, at 203. A union member who wishes to complain of his treatment by his union to the courts must show not merely that the union has not acted in his interest or with bias, but also that it is guilty of "hostile discrimination." A bargain which favors one class of employees over another is not necessarily prohibited as a hostile discrimination. Ford Motor Co. v. Huffman, (1953) 345 U.S. 330.

> " .. in order to establish a breach by the union of its duty to represent the employees fairly, as the bargaining representative of the employees sanctioned by statute, it is not enough to prove that the union was wrong in demanding Cunningham's dismissal. This duty was no more than to forbear from 'hostile discrimination'. The arbitrariness shown must be of the bad faith kind ... Something akin to factual malice is necessary ..."
>
> Cunningham v. Erie Railroad Co., (1959), 2d Cir., 266 F. 2d 411

Also see Jackson v. Trans World Airlines, Inc., (1972 2d Cir.) 457 F. 2d 202.

> "Absent a showing of 'hostile discrimination', there is no breach of the duty of fair representation merely

> because the negotiated agreement fails to satisfy all persons represented by the union." (Id., p. 204)

In this latter case, the 2nd Circuit Court repeated the statement in Cunningham, supra, that "Something akin to factual malice is necessary to establish a breach of this duty of fair representation." (Id., p. 204)

Realizing that a large degree of discretion is vested in the union to make agreements changing rights previously held by members or groups of members before it can be charged with unfair representation, and that in so sensitive a position as flight engineer, TWA and ALPA can normally find a "tenable" basis for discharge, the A and A1 flight engineers, FEIA and TWA agreed expressly that (1) TWA would not enter into any "agreement" that would deny an A or A1 flight engineer his prior rights, and that (2) TWA would not take "any action" denying him his prior rights, however free from "malice" or "hostile discrimination" his union might be in agreeing to or taking such action. Any number or kinds of agreements could be reached by the A or A1's representative to replace the Crew Complement Agreement or its Memorandum C, without "malice" toward him, a very difficult charge to prove at any time by anybody. Affording the A and A1 flight engineer a prior right to the flight engineer seat is not the only bona fide treatment that he could receive, but it was the one TWA guaranteed

to him, and he was assured by TWA that it would remain intact no matter what organization might represent him and no matter what agreement it might choose to make, even in good faith. ALPA was not a party to the Individual agreement. It could not be charged with "malice" or "hostile discrimination" merely because it agreed with TWA to modify the Agreement, Jackson et al v. TWA, supra, nor because it might refuse to support his claim before a pilot system board of adjustment that his priority has been taken away from him.

The difference between this case and Jackson is that there was no Individual agreement giving entirely neutral review in the latter case. The bargaining agent had complete control, bound only by its duty to represent free from malice and hostility. In this case, the agreement is between TWA and the individual, although negotiated by FEIA and TWA. It is consistent with the collectively bargained agreement between FEIA and TWA (Memorandum C); it has not been and cannot be changed by TWA without the approval of the A or Al flight engineers (Jt. Ex. 8, Par. 3; App. p. A-53); it includes a commitment to make no agreement nor to take any action that varies from it, and it is expressly enforceable by him alone and through an agreed upon, expeditious, independent, and truly

neutral enforcement machinery. The Jackson grievance and its disposition by the Court illustrates the foresight of the A and A1 flight engineers in assuring their priority as against other flight crew members by an Individual agreement, rather than by leaving it to the "fair representation" obligations of ALPA and to its System Board of Adjustment for relief.

A system board of adjustment under the Railway Labor Act is not an impartial tribunal. It is bi-partisan, rather than impartial and disinterested. Arnold v. United Airlines, Inc. (7th Cir., 1961) 296 F. 2d 191 at 195. The grievant has no right to insist upon the appointment of a neutral member. In Stumo v. United Airlines, Inc. (7th Cir. 1967) 382 F. 2d 780, cert.den. 389 U.S. 1042 (1968), the Court, in rejecting plaintiff's attempt to avoid a biased "4-Man System Board," stated that the carrier "was under no legal obligation" to respond to plaintiff's request for a neutral referee because "the suggestion was premature inasmuch as the agreement expressly provided that a neutral referee should be employed only in the event of a Board deadlock." (Id. p. 787). The TWA-ALPA Agreement also so provides. (Jt. Ex. 10, Sec. 21A, at p. 145: Exhibit volume). Furthermore, a nuetral, when appointed, can be outvoted by the partisan members of the Board, as has happened in this case.

The A and A1 flight engineer has the right to rely on TWA's contractual commitment to him in the Individual agreement and in the Crew Complement Agreement to a resolution of his claim in a neutral environment. He is not restricted for relief to ALPA's duty of fair representation.

POINT IV.

THE JURISDICTION OF THE TWA-ALPA SYSTEM BOARD OVER DEFENDANTS UNDER THE TWA-ALPA BASIC AGREEMENT DOES NOT DEPRIVE THE INDIVIDUAL ARBITRATOR OF HIS JURISDICTION TO DETERMINE THE CLAIMS OF DEFENDANTS TO PRIOR RIGHTS AS FLIGHT ENGINEERS UNDER THE CREW COMPLEMENT AGREEMENT OF JUNE 1, 1962.

The finality of the jurisdiction of the System Board of Adjustment, including that of a 4-Man System Board, and the dichotomy of jurisdiction between the System Board under one agreement and the jurisdiction of another arbitration tribunal appointed under another agreement in connection with flight engineer and pilot rights has already been directly and explicitly resolved on TWA.

In the case of Thorgeirsson v. Trans World Airlines, Inc., (1968) 288 F. Supp. 71, the Court was met with an issue similar to that which is presented to the Court in this proceeding. In the Thorgeirsson case, the plaintiff was a new hire flight engi-

neer training for the pilot first officer position under the pilot agreement. He was not covered by the Crew Complement Agreement. However, at the time of his discharge under the pilot agreement and after his discharge was upheld by the Pilot System Board of Adjustment, he claimed the right under the Flight Engineer working Agreement to appeal his discharge as a flight engineer. The arbitrator, Prof. Michael Sovern, ruled that Mr. Thorgeirsson did retain seniority rights under the Flight Engineer working Agreement and that therefore the decision of the TWA-ALPA System Board sustaining his discharge as a pilot for failing to complete his first officer training satisfactorily did not deny him his right to appeal to the Flight Engineer System Board under the Flight Engineer Agreement, even though he was serving under the Pilot Agreement when he was discharged. The Flight Engineer System Board then proceeded to consider the merits of his claim and ruled in favor of Thorgeirsson, awarding him reinstatement as a flight engineer despite the decision of the Pilot System board that he had properly been discharged by the Company.

The situation changed after the Thorgeirsson decision only in the sense that ALPA took over the bargaining rights of

FEIA in March, 1968, and then negotiated an agreement covering the flight engineers and pilots. (Jt. Ex. 9) That agreement differed from the FEIA/TWA agreement in that "new hire" pilots no longer retained seniority as flight engineers under a separate agreement, were subject exclusively to the TWA-ALPA Agreement, and therefore could not make the same plea that Thorgeirsson was able to make when the flight engineers were represented by FEIA. However, the A and Al flight engineers are still covered by the separate Crew Complement Agreement and the Individual agreement and therefore they still have residual rights that the "new hire" flight engineers no longer have. The assertion of those rights under the Crew Complement Agreement and the Individual agreement is the same as was the assertion of rights by Thorgeirsson under the Flight Engineer Agreement, when there was a separate Flight Engineer Agreement covering that craft which gave residual rights to the flight engineer position to the new hires who had served as flight engineers before they moved into the pilot position.

In Thorgeirsson, as in this case, TWA contended that the decision of the ALPA/TWA Pilot System Board was final and binding on the question of discharge for cause and therefore Thorgeirsson no longer had the right to make an appeal for reinstatement as a flight engineer.

The Court in Thorgeirsson decided otherwise. The following paragraph in the Court's opinion on the jurisdiction of the TWA-ALPA System Board is as applicable to the claims of the 19 defendants in this case as it was to Thorgeirsson's claims:

> "(4) Respondent's jurisdictional arguments, which have been previously rejected in a well-reasoned opinion by the Flight Engineers' Board, are without merit. Neither the Railway Labor Act nor the TWA-FEIA agreement prevents the Flight Engineers' Board from deciding Thorgeirsson's grievance. Thorgeirsson is claiming rights that stem from the status he acquired when employed as a flight engineer under the TWA-FEIA contract. The Flight Engineer's Board is the only System Board which has authority to interpret and apply this agreement and determine whether a flight engineer who has crossed-over to become a pilot and is then discharged has a contractual right to reinstatement as a flight engineer. The fact that Thorgeirsson was not working as a flight engineer when he was discharged does not impair his right to process grievances concerning his flight engineer's status to the Flight Engineers' Board. If this were not so, many other express provisions in the TWA-FEIA agreement providing that flight engineers retain seniority when working in other positions would become unenforceable. ***
>
> "(5) Nor does the fact that Thorgeirsson processed a grievance with the Pilots' Board preclude resort to this Flight Engineers Board. The Pilots' Board only has jurisdiction to adjudicate Thorgeirsson's status as a pilot. It is not empowered to determine his status as a flight engineer under the TWA-FEIA agreement.
>
> Id. at p. 76

POINT V.

TWA'S CLAIM OF LACHES AND THAT DEFENDANTS FAILED TO COMPLY WITH THE TERMS OF THE INDIVIDUAL AGREEMENTS, IN THAT EACH FAILED TO ASSERT HIS CLAIM WITHIN THE TIME AND MANNER PROVIDED THEREIN, IS WITHOUT SUBSTANCE. MOREOVER, SUCH A CLAIM IS SUBJECT TO DETERMINATION ONLY BY THE ARBITRATOR APPOINTED IN THE AGREEMENT.

The Individual agreement does not require the defendants to assert their objections to the action of the Company within any specific period of time. They chose to do so in the month of June, 1971, for reasons good and sufficient, all of which are immaterial to the issue before the Court. They also chose to make their objections in an appropriate manner and at an appropriate time, as has been shown in the previous sections of this brief.

Since the laws of the State of New York were agreed to be applicable not only for the construction of the Individual agreements but also their enforcement, defendants utilized the procedure made in those laws to effect arbitration despite the resistance of one of the parties. Section 7503(c) of the New York Civil Practice Law & Rules will effectively lead to an arbitration proceeding as agreed. In the absence of a stay, the defendants will forthwith proceed as the agreement provides to submit their objections to Prof. Feinsinger, of the University of

Wisconsin, who will presumably be required to "schedule a hearing on Flight Engineer's objection within four (4) calendar days following receipt thereof, and shall render his decision thereon not later than four (4) calendar days thereafter," subject to a possibly more reasonable and practical procedure if agreed to by all parties under the circumstances.

In any event, the question of laches and of whether the defendants have asserted their claims within the time and manner provided in the Individual agreement is for the arbitrator and not for this Court to determine. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Belk v. Allied Service Co. of New Jersey, Inc., 315 F. 2d 513 (2nd Cir. 1963); Carey v. General Electric Co., 315 F. 2d 499 (2d Cir. 1963); Western Automatic Machine Screw Co. v. Int'l Union, 335 F. 2d 103 (6th Cir. 1964); Bevington & Basile Wholesalers v. Local 46, 330 F. 2d 202 (8th Cir. 1964; Avco Corp., Electronics & Ordinance Div. v. Mitchell, 336 F. 2d 289 (6th Cir. 1964); Amalgamated Motor Coach Employees v. Trailways of New England, Inc., 232 F. Supp. 608 (D.C., Mass. 1964); Rochester Telephone Corp. v. Communication Workers of America, 340 F. 2d 237 (2d Cir. 1965); Local 198, United Rubber, Cork, Linoleum & Plastic Workers v. Interco. Inc., 415 F.2d 1208 (8th Cir. 1969); Palestine Telephone v. Local Union 1506, 379 F. 2d 234, 240 (5th Cir. 1967); Matter of Long Island Lumber Co. v. Martin, 15 NY 2d 380 (1965); Tobacco Workers v. Lorillard Corp. (4th Cir., 1971)

448 F. 2d 949; International Union of Electrical, etc. Workers v. Westinghouse (S.D.N.Y., 1963) 218 F. Supp. 82, 86.

CONCLUSION

The Individual Agreement signed by TWA and each A and A1 flight engineer employed by TWA, including each of the defendants, affords him the right to arbitrate his claim that his discharge by TWA denies him his priority to the flight engineer position before the Individual arbitrator appointed under the Individual Agreement.

The intent of the Individual Agreement and its arbitration provision, is to assure him a neutral and impartial consideration of his claim, not subject to control or final resolution by TWA and ALPA, or either of them, through the TWA-ALPA Pilots System Board of Adjustment. The decisions of TWA, ALPA and the TWA-ALPA Pilot System Board of Adjustment upholding the discharge of an A or A1 flight engineer do not terminate the agreement to arbitrate before the Individual arbitrator. They are relevant only to the question of whether the Company still owes them the obligation to recognize a priority to the flight engineer position. That issue may be resolved only by the Arbitrator.

The issue of laches and timeliness as submitted by the

plaintiff are matters within the jurisdiction of the Individual arbitrator and are to be resolved by him.

Dated: New York, N.Y.
January 8, 1976

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

VAN JOHNSON, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 125 WEST 106 ST NEW YORK, N.Y.

That on the 19th day of JANUARY, 1976, deponent personally served the within BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

POLETTI, FREIDIN PRASHKER FELDMAN & GARTNER
ATTORNEYS FOR PLAINTIFF, APPELLEE
777 THIRD AVE.
NEW YORK, N.Y.

Van Johnson

Sworn to before me this
19th day of January, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977